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No. 95-209

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

JEFFERSON-PILOT LIFE INSURANCE COMPANY, INC.,

Petitioner,

v.

WILLARD WEEMS and JULIA WEEMS,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

BRIEF *AMICI CURIAE* ON BEHALF OF AMERICAN COUNCIL OF LIFE INSURANCE, HEALTH INSURANCE ASSOCIATION OF AMERICA AND ALLIANCE FOR MANAGED CARE IN SUPPORT OF PETITION FOR CERTIORARI

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BRIEF *AMICI CURIAE* ON BEHALF OF AMERICAN COUNCIL OF LIFE INSURANCE, HEALTH INSURANCE ASSOCIATION OF AMERICA AND ALLIANCE FOR MANAGED CARE IN SUPPORT OF PETITION FOR CERTIORARI

The American Council of Life Insurance ("ACLI"), the Health Insurance Association of America ("HIAA") and the Alliance for Managed Care ("AMC") respectfully submit this brief in support of the petition for a writ of certiorari

filed by Jefferson-Pilot Life Insurance Company, Inc. ("Jefferson-Pilot") in this case.[1]

INTERESTS OF THE *AMICI*

ACLI is the largest life insurance trade association in the United States, with 606 member life insurance companies. HIAA is the largest health insurance trade association in the United States, representing approximately 230 commercial health insurers, which provide health insurance coverage to over 50 million Americans. AMC is a coalition of four of the country's largest managed care companies—Aetna, CIGNA, The Prudential, and MetraHealth (the recent merger of the Travelers and Metropolitan health insurance companies)—which provide health insurance for over 60 million Americans in twenty-four states. Together, the members of the *amici* organizations have issued the overwhelming majority of life and health insurance currently in force in the United States.

Members of ACLI, HIAA and AMC play an important role in providing insurance benefits to millions of American workers through employee welfare benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461. Insurance companies—including many members of ACLI, HIAA, and AMC—fund the vast majority of the employee welfare benefit plans in this country, providing insurance coverage to over 82 million Americans under ERISA-regulated employee welfare benefit plans. In addition, many members of ACLI, HIAA and AMC are responsible for administering their funded plans, as well as the majority of employer self-insured health programs in this country.

Amici submit that certiorari should be granted on the first question presented in this case and that the decision below should be summarily reversed because the Alabama

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[1]Letters reflecting written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

Supreme Court lacked jurisdiction over plaintiffs' claims under ERISA for breach of fiduciary duty and interference with ERISA-protected rights. However, in the event that this Court does not reverse on jurisdictional grounds, the Court should grant certiorari on the second question presented to remove any possible doubt concerning whether extracontractual damages, punitive or otherwise,[2] are available under ERISA.

Amici are concerned that the Alabama Supreme Court's decision in this case, if left uncorrected by this Court, will seriously undermine the ERISA civil enforcement scheme enacted by Congress. The Alabama court's decision significantly increases the risks to insurers that fund and administer employee welfare benefit plans by introducing into ERISA the highly unpredictable remedies of punitive damages and other subjective extracontractual damages such as "mental anguish" and "pain and suffering." Insurance companies depend upon predictability in the law to assess risks and to accumulate sufficient reserves for payment of claims, but the decision below injects enormous uncertainty and inconsistency in the law of ERISA. The inevitable consequence of the erroneous ruling of the Alabama court is to drive up the cost—and price—of employee benefit and welfare plans, in contradiction to Congressional intent.

Amici believe that their members' exposure to the enormous uncertainties created by extracontractual damages under ERISA makes them particularly well situated to address the important issues presented by this case. One or more of the *amici* groups has filed an *amicus* brief in

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[2]The term "extracontractual damages" is used to refer to all damages, both punitive and compensatory, other than "contractual damages for loss of plan benefits," *Massachusetts Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 138 (1985). "Compensatory damages," as used in this brief, refers to non-punitive extracontractual damages, such as damages for "mental anguish," "pain and suffering" and lost wages.

virtually all of the significant ERISA and punitive damages cases decided by this Court during the past decade. ACLI, HIAA and AMC believe that their participation as *amici* is similarly appropriate here in order to assist the Court in determining whether to grant certiorari.

REASONS FOR GRANTING THE WRIT

Even assuming that the Alabama state courts below have jurisdiction over the ERISA claims in this case,[3] certiorari should be granted in this case because the decision below directly contradicts this Court's precedents establishing that extracontractual damages may not be recovered under ERISA. In holding that such damages are available, the Alabama Supreme Court's reasoning consists largely of quoting extensively from its own opinion in *Haywood* v. *Russell Corp.*, 584 So. 2d 1291 (Ala. 1991), which relies, in turn, on a misreading of *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133 (1990). According to the Alabama court, the "holding" of *Ingersoll-Rand* is "that state and federal 'courts are authorized to award damages, *both extracontractual, and even punitive*, where the facts support them. . . . though they are not specifically provided for in ERISA.'" Pet. App. 9a (quoting *Haywood*, 584 So. 2d at 1297) (emphasis in original).

The Alabama Supreme Court's interpretation of *Ingersoll-Rand* is flatly wrong. This Court's decisions in *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U.S. 134 (1985); *Pilot Life Insurance Co.* v. *Dedeaux*, 481 U.S. 41 (1987); and *Mertens* v. *Hewitt Associates*, 113 S. Ct. 2063 (1993), establish that the exclusive civil remedies

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[3]Although *amici* agree with petitioner that the Alabama Supreme Court erroneously held that Alabama state courts have jurisdiction to hear plaintiffs' ERISA claims, *see* Petition for Certiorari at 9-11, this brief will focus primarily on addressing the Alabama Supreme Court's ruling that extracontractual damages are available under ERISA because of the significance of that ruling to the insurance industry.

under ERISA for plan participants and beneficiaries are the causes of action expressly listed in ERISA § 502(a), none of which authorize the award of extracontractual damages. As the Alabama court's decision demonstrates, however, the *Ingersoll-Rand* opinion contains language that has been misconstrued by lower courts as endorsing the availability of extracontractual damages under ERISA. Accordingly, if this Court does not summarily reverse on jurisdictional grounds, it should grant certiorari, to make it clear that compensatory and punitive damages are not available to ERISA-plan participants and beneficiaries, and to send a strong signal that the Court will not tolerate lower court efforts to evade Congress' intent concerning the statute's remedies.

If allowed to stand, the Alabama Supreme Court's decision would directly undermine a primary purpose of ERISA, which was to establish a uniform and consistent legal framework for the administration of employee benefit plans. In excluding extracontractual damages from the remedies available to plan participants and beneficiaries, Congress sought to establish a civil enforcement scheme without the uncertainties associated with punitive damages and other extracontractual legal remedies, thereby reducing the expenses of administering employee benefit plans and creating more incentive for employers to establish such plans for their employees. The decision below threatens to destroy the carefully crafted enforcement structure enacted by Congress and upset the balance struck by Congress between "'the primary [ERISA] goal of benefitting employees and the subsidiary goal of containing pension costs.'" *Mertens*, 113 S. Ct. at 2072 (quoting *Alessi* v. *Raybestos-Manhattan, Inc.*, 451 U.S. 504, 515 (1981)).

I. THIS COURT SHOULD GRANT CERTIORARI TO ELIMINATE THE POSSIBILITY THAT LOWER COURTS THAT DISAGREE WITH THIS COURT'S ERISA JURISPRUDENCE WILL MISREAD *INGERSOLL-RAND* TO PERMIT THE AWARD OF COMPENSATORY AND PUNITIVE DAMAGES UNDER ERISA

A. *Ingersoll-Rand* Remains Subject To Misinterpretation By The Lower Courts

The decision below is based upon a fundamentally wrong interpretation of *Ingersoll-Rand*. Certiorari should be granted to correct the Alabama Supreme Court's erroneous holding that ERISA supports the award of extracontractual damages and thereby to preclude other lower courts from following that decision.

In *Ingersoll-Rand*, the plaintiff brought suit in Texas state court seeking compensatory and punitive damages on state common law claims alleging that his employer fired him "to avoid making contributions to his pension fund." 498 U.S. at 135. The Texas Supreme Court held that the plaintiff's claims were not preempted by ERISA because the plaintiff was seeking "lost future wages, mental anguish and punitive damages" rather than "pension benefits." *Id.* at 136. This Court, however, reversed, holding that the state law claims were expressly preempted by § 514(a) of ERISA because the claims "relate[d] to" an employee benefit plan. *Id.* at 140. In addition, the Court held the claims preempted by ERISA because they "conflict[ed] directly" with the ERISA cause of action under § 502(a) for violation of § 510, which "protects plan participants from termination motivated by an employer's desire to prevent a pension from vesting." *Id.* at 143. At the end of the *Ingersoll-Rand* opinion, the Court observed:

> Not only is § 502(a) the exclusive remedy for vindicating § 510-protected rights, but there is no basis in § 502(a)'s language for limiting ERISA actions to only those which seek "pension benefits." It is clear that the relief requested here is well within the power of federal courts to provide.

> Consequently, it is no answer to a pre-emption argument that a particular plaintiff is not seeking recovery of pension benefits.

Id. at 145.

The Alabama Supreme Court, both in this case and in *Haywood*, has badly misread the above-quoted paragraph from *Ingersoll-Rand* to mean that this Court has given its blessing to awards of punitive damages and other extracontractual damages under ERISA. According to the Alabama court, because the *Ingersoll-Rand* plaintiffs had sought extracontractual damages under the state law claims held to be preempted by ERISA, this Court's statement that "the relief requested . . . is well within the power of the federal courts to provide" establishes that the extracontractual damages sought in *Ingersoll-Rand* are recoverable under ERISA.[4]

At one time, the Alabama Supreme Court was not alone in its misreading of *Ingersoll-Rand*.[5] Indeed, both petitioners and the United States argued in *Mertens* that *Ingersoll-Rand* supported the availability of extracontractual

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[4]Indeed, in its decision below, the Alabama Supreme Court reiterated its view that this Court's "'holding'" in *Ingersoll-Rand* that extracontractual damages are available under ERISA was "'unanimous and unequivocal. No reasonable person can misunderstand it, although one might disagree with it. In our view, it comes as no surprise.'" Pet. App. 13a (quoting *Haywood*, 584 So. 2d at 1296).

[5]Some courts had read *Ingersoll-Rand* to recognize extracontractual damages under ERISA. *See, e.g., McDonald* v. *Artcraft Electric Supply Co.*, 774 F. Supp. 29, 32 (D.D.C. 1991); *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America* v. *Midland Steel Products Co.*, 771 F. Supp. 860, 863 (N.D. Ohio 1991); *Blue Cross & Blue Shield of Alabama* v. *Lewis*, 753 F. Supp. 345, 347 (N.D. Ala. 1990).

damages under ERISA. *See* Brief for the Petitioners at 22 (arguing that in *Ingersoll-Rand* "the Court concluded that the remedial provisions of section 1132 [ERISA § 502] are broad enough to encompass remedies which are *not* specifically enumerated") (emphasis in original) and Brief for the United States as Amicus Curiae Supporting Petitioners at 14 (arguing that the *Ingersoll-Rand* dicta supported interpretation of § 502(a)(3) to authorize extracontractual damages), *Mertens* v. *Hewitt Assocs.*, 113 S. Ct. 2063 (1993) (No. 91-1671).[6]

This Court in *Mertens* rejected those arguments and squarely held that extracontractual damages are not available under § 502(a)(3) of ERISA. 113 S. Ct. at 2068-72. But the *Mertens* decision did not expressly address the *Ingersoll-Rand* dicta relied upon by the Alabama Supreme Court in this case. As demonstrated by the Alabama Supreme Court's decision here, *Ingersoll-Rand* can be exploited by those lower courts that disagree with this Court's general ERISA jurisprudence to reach a

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[6]Prior to *Mertens*, some courts had already rejected the view that *Ingersoll-Rand* established a right to extracontractual damages under ERISA. For example, the Eleventh Circuit correctly concluded:

> The Supreme Court [in *Ingersoll-Rand*] was stating that federal law provides relief for ERISA actions other than those that seeks to recover pension benefits. . . . The Supreme Court . . . [was] not holding that the specific ***remedies*** . . . sought under state law [by the *Ingersoll-Rand* plaintiffs] are necessarily the remedies that will be afforded . . . under ERISA § 502.

McRae v. *Seafarers' Welfare Plan*, 920 F.2d 819, 821 n.7 (11th Cir. 1991) (emphasis in original); *see also Medina* v. *Anthem Life Ins. Co.*, 983 F.2d 29, 32 (5th Cir.); *cert. denied*, 114 S. Ct. 66 (1993); *Harsch* v. *Eisenberg*, 956 F.2d 651, 660 (7th Cir.), *cert. denied*, 113 S. Ct. 61 (1992).

result wholly at odds with what this Court has said ERISA means.

For example, in the decision below, the Alabama Supreme Court quite candidly expressed its "'dissatisfaction with . . . [this] Court's broad interpretation of the preemption provisions of ERISA,'" Pet. App. 13a (quoting *Haywood*, 584 So. 2d at 1296), and repeated its belief that this Court's "'construction of the preemption provisions of ERISA, without a recognition of some rights and remedies to take the place of preempted state rights and remedies, went beyond what the Congress intended,'" *id.* 13a-14a. There is thus little surprise in the Alabama Supreme Court's holding that extracontractual damages are available under ERISA, even though that ruling flies in the face of *Mertens*, apparently yet another ERISA decision of this Court with which the Alabama Supreme Court disagrees.

Accordingly, this Court should grant certiorari to eliminate the opportunity for lower courts to use *Ingersoll-Rand* as a vehicle for disregarding this Court's ERISA teachings and to make clear that extracontractual damages are not available under ERISA.

B. The Decision Below Cannot Be Squared With This Court's ERISA Precedents

The decision below is indefensible in light of this Court's ERISA precedents. Plaintiffs' ERISA claims expressly invoke §§ 404(a), 404(b), 405(a)(1), 405(a)(3), 409, 502(a)(1)(B), and 502(a)(3) of ERISA,[7] Pet. App. 4a, and implicitly rely on § 510.[8] None of these statutory

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[7]29 U.S.C. §§ 1104(a), 1104(b), 1105(a)(1), 1105(a)(3), 1109, 1132(a)(1)(B), 1132(a)(3).

[8]29 U.S.C. § 1140 (prohibiting interference with protected rights). Plaintiffs assert that Jefferson-Pilot "'interfered with [their] rights to receive ERISA benefits.'" Pet. App. 9a (quoting the complaint).

provisions provide any basis for recovery of extracontractual damages in this case, as demonstrated by a series of decisions rendered by this Court both prior to and after *Ingersoll-Rand*.

Any argument that extracontractual relief is available under §§ 404(a), 404(b), 405(a)(1), 405(a)(3), 409 or 510 should be precluded by this Court's decisions recognizing that § 502(a)'s express terms provide the exclusive remedies for civil enforcement of ERISA. As the Court observed in *Russell*, "[t]he six carefully integrated civil enforcement provisions found in § 502(a) . . . provide strong evidence that Congress did ***not*** intend to authorize other remedies that it simply forgot to incorporate expressly." 473 U.S. at 146 (emphasis in original).[9] The Court adhered to this view in *Pilot Life*, concluding that § 502(a) is "the exclusive vehicle for actions by ERISA-plan participants and beneficiaries asserting improper processing of a claim for benefits," 481 U.S. at 52. Thus, if plaintiffs have any basis for extracontractual damages, the right to such relief must be found in one of the provisions of § 502(a) on which they rely—namely § 502(a)(1)(B) or § 502(a)(3).

Russell makes clear, however, that the relief under § 502(a)(1)(B) does *not* include extracontractual damages. That provision "says nothing about the recovery of extracontractual damages." *Id.* Rather, § 502(a)(1)(B) authorizes a beneficiary or participant only "to recover accrued benefits, to obtain a declaratory judgment that she is entitled to benefits under the provisions of the plan contract, and to enjoin the plan administrator from improperly refusing to pay benefits in the future." *Id.* at 147.

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[9]In *Russell*, the Court specifically held that Section 409 does not establish a right to extracontractual damages for participants and beneficiaries. 473 U.S. at 144.

Similarly, two years ago in *Mertens*, the Court held that extracontractual damages—whether compensatory or puntive—may not be recovered as "equitable relief" under § 502(a)(3). 113 S. Ct. at 2068. In *Mertens*, the Court held that the only remedies available under § 502(a)(3) are "those categories of relief that were ***typically*** available in equity . . . ." 113 S. Ct. at 2069 (emphasis in original). Compensatory damages, the Court said, "are, of course, the classic form of ***legal*** relief." *Id.* at 2068. And even the dissent agreed that punitive damages were not available under § 502(a)(3). *Id.* at 2076 (White, J., dissenting); *see also Tull* v. *United States*, 481 U.S. 412, 422 & n.7 (1987).

Thus, there is simply no principled basis in *Russell, Pilot Life* and *Mertens* for the Supreme Court of Alabama to hold that plaintiffs may pursue extracontractual damages. Nevertheless, as the Alabama Supreme Court's decision demonstrates, the *Ingersoll-Rand* dicta can be used to muddy the otherwise clear line of decisions foreclosing such relief. Review by this Court is warranted to clarify this area of the law and to remove any doubt that ERISA precludes plan participants and beneficiaries from recovering compensatory and punitive damages.

II. IF LEFT UNCORRECTED, THE ALABAMA SUPREME COURT'S DECISION WILL DIRECTLY UNDERMINE THE INTENT OF CONGRESS TO CONTAIN INSURANCE AND PENSION COSTS UNDER ERISA

According to the Alabama Supreme Court, its holding that extracontractual damages are available under ERISA "'simply carries out the intent of Congress in passing ERISA.'" Pet. App. 15a (quoting *Haywood*, 584 So. 2d at 1297). The Alabama court reasoned that such damages must be available to ERISA-plan participants and beneficiaries because they are "'the very persons whose rights were the focus of the legislation.'" Pet. App. 16a (quoting *Haywood*, 584 So. 2d at 1298).

Although the Alabama Supreme Court is correct that ERISA was intended to protect the rights of ERISA-plan

participants and beneficiaries, Congress also sought to fashion legal rules to contain the costs of funding and administering employee benefit plans and thus further the "public interest in encouraging the formation of . . . [such] plans." *Pilot Life*, 481 U.S. at 54. In so doing, Congress struck a balance between the "'primary [ERISA] goal of benefitting employees and the subsidiary goal of containing pension costs.'" *Mertens*, 113 S. Ct. at 2072 (quoting *Alessi*, 451 U.S. at 515). Congress "resolved innumerable disputes between powerful competing interests—not all in favor of potential plaintiffs." *Id.* at 2071.

The balance struck by Congress on the issue of extracontractual damages was to preclude the award of such damages to ERISA-plan participants and beneficiaries. Thus, "there is a stark absence—in the statute itself and in its legislative history—of any reference to an intention to authorize the recovery of extracontractual damages." *Russell*, 473 U.S. at 148.

Congress certainly had a legitimate basis to preclude the award of extracontractual damages in suits brought by ERISA-plan participants and beneficiaries. Punitive damages, in particular, are a dire threat to the careful balance struck by Congress when it enacted ERISA. This Court has recognized that "[p]unitive damages pose an acute danger of arbitrary deprivation of property," *Honda Motor Co., Ltd.* v. *Oberg*, 114 S. Ct. 2331, 2340 (1994), and has expressed "concern about punitive damages that 'run wild.'" *Pacific Mutual Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 18 (1991). "'[P]unitive damages are a powerful remedy which itself may be abused, causing serious damage to public and private interests and moral values.'" *Id.* at 18 n.8 (quoting David Owen, *The Moral Foundations of Punitive Damages*, 40 Ala. L. Rev. 705, 739 (1989)). Punitive damage jury instructions "typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences." *Honda*, 114 S. Ct. at 2340-41. As a result, "juries assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the

actual harm caused." *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *accord City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 270-71 (1981) ("The impact of such a windfall recovery is likely to be both unpredictable and, at times, substantial.").

The Alabama judicial system, which produced the decision below, aptly demonstrates the serious problems of punitive damages that Congress sought to avoid in enacting ERISA. Alabama state courts have earned a nationwide reputation for punitive damage awards that "grow thick and wild." G. Jaynes, *Where The Torts Blossom*, Time, Mar. 20, 1995, at 38. Indeed, in one six-month period last year, from March through August 1994, Alabama juries went on a frenzy, dispensing six eight-digit punitive damage awards of $50,000,000, $33,000,000, $25,000,000, $22,750,000, $15,000,000, and $10,000,000 for a total of over $155,000,000. *See* Brief *Amicus Curiae* of The Alabama Business Council in *BMW of North America, Inc.* v. *Gore*, U.S. 94-896 (filed Mar. 23, 1995). This trend of awards has continued in 1995. For example, in August, an Alabama jury imposed $25,000,000 in punitive damages against The Prudential for alleged deceptive sales practices in issuing a $25,000 variable life-insurance policy. *See Insurer-Lawsuit Damages*, The Wall Street Journal, Aug. 31, 1995, at A3.

The explosion of punitive damage awards is also reflected in the judgments affirmed by the Alabama Supreme Court. *See generally* Brief *Amici Curiae* of Life Insurance Company of Georgia, et al., at 14-16, 4a-23a, in *BMW*. For example, in *Northwestern Mutual Life Insurance Co.* v. *Sheridan*, 630 So. 2d 384 (Ala. 1993), the Alabama Supreme Court affirmed a remitted punitive damages award of $12,463,624 against an insurance company on a state common law "claim of negligence and/or wantonness" after holding that this claim was not preempted by ERISA. *Id.* at 387, 394; *see also HealthAmerica* v. *Menton*, 551 So. 2d 235 (Ala. 1989); *cert. denied*, 493 U.S. 1093 (1990) (affirming a $1,797,588 punitive damages award against a health maintenance organization on a state common law claim held not to be preempted by ERISA). And following on the

heels of its *BMW* decision,[10] the Alabama Supreme Court only a few months ago upheld in a business fraud case a remitted punitive damages award of $15,000,000. *Duck Head Apparel Co.* v. *Hoots*, Nos. 1931146, 1931171, 1995 WL 64270 *6 (Ala. Feb. 17, 1995). The prospect of these mammouth and unpredictable punitive damages awards certainly justifies the decision of Congress to exclude the punitive damages remedy from the ERISA civil enforcement scheme.

Moreover, Congress had good reason to exclude other forms of extracontractual damages, especially the sort of "mental anguish" damages sought here, from the panoply of remedies available under ERISA. "Mental anguish" damages have long been recognized as being subject to manipulation and highly uncertain measurement: "[t]ranslating pain and anguish into dollars can, at best, be only an arbitrary allowance . . . ." *Seffert* v. *Los Angeles Transit Lines*, 56 Cal. 2d 498, 511 (1961) (Traynor, J., dissenting) (quoting McCormick, *Damages* § 88, pp. 318-19); *see also Consorti* v. *Armstrong World Industries, Inc.*, Nos. 94-7501, 857, 1995 WL 507557, at *6 (2d Cir. Aug. 28, 1995) ("compensation for suffering can be accomplished only in a symbolic and arbitrary fashion"). "[B]ecause no objective criteria exist for valuing these damages, they may vary widely and become astronomically high." Note, Nancy L. Manzer, *1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability*, 73 Cornell L. Rev. 628, 631-32 (1988). In the *Duck Head* case, the Alabama Supreme Court sustained $3,500,000 in "mental anguish" damages awarded to three salesmen who sued their former employer for lost sales commissions. *See Duck Head*, 1995 WL 64270, at *17. "Although the nonquantifiable nature of intangible injuries creates obvious compensation problems, these problems are not unique to such injuries." Stanley Ingber, *Rethinking Intangible*

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[10] *BMW of N. Am., Inc.* v. *Gore*, 646 So. 2d 619 (Ala. 1994), *cert. granted*, 115 S. Ct. 932 (1995) (No. 94-896).

Injuries: A Focus on Remedy, 73 Calif. L. Rev. 772, 779 (1985). "For example, damages for lost future wages, often viewed as tangible, economic losses, are also uncertain and a matter of conjecture" regarding numerous issues, including what jobs the plaintiff would have held and what salaries he would have received. *Id.*

The uncertainties associated with extracontractual damages have a serious impact on the insurance industry, which is particularly dependent on predictability in the law. As the Court has observed, the business of insurance

> depend[s] on the accumulation of large sums to cover contingencies. The amounts set aside are determined by a painstaking assessment of the insurer's likely liability. Risks that the insurer foresees will be included in the calculation of liability, and the rates or contributions charged will reflect that calculation. The occurrence of major unforeseen contingencies, however, jeopardizes the insurer's solvency and, ultimately, the insureds' benefits. Drastic changes in the legal rules governing pension and insurance funds, like other unforeseen events, can have this effect.

Los Angeles Department of Water & Power v. *Manhart*, 435 U.S. 702, 721 (1978); *see also Consorti*, 1995 WL 507557, at *7 ("Widely varying jury verdicts make it difficult for risk bearers to structure their behavior to efficiently manage risk."). The Alabama Supreme Court's decision here creates precisely the type of unforeseen risk to pension and insurance funds that Congress sought to minimize when it enacted ERISA.

Moreover, to the extent that extracontractual damages are recoverable directly from ERISA plans, such damages may upset the plan's financial calculations, "leaving fewer funds available to pay the claims of beneficiaries" and "requiring actuarial adjustments, since such a judgment [for extracontractual damages] will not have been a factor in the plan's projections." *Cromwell* v. *Equicor-Equitable HAC Corp.*, 944 F.2d 1272, 1279 (6th Cir. 1991) (Suhreinrich, J., concurring), *cert. dismissed*, 113 S. Ct. 2 (1992).

"Thus, the assessment of . . . judgments [of extracontractual damages] against a plan may reduce the amount available to the plan's beneficiaries and increase administrative costs." *Id.*; *see also Barnes Hosp.* v. *Sanus Passport/Preferred Servs., Inc.*, 809 F. Supp. 725, 728 (E.D. Mo. 1992) (extracontractual damages "would produce more than a 'tenuous, remote, and peripheral' effect on the plan" by rendering it liable for amounts "far in excess of the limits set forth in the plan").

Notwithstanding the serious threat that extracontractual damages pose to the stability of employee welfare benefit plans and the insurance industry in general, the Alabama Supreme Court has taken upon itself to "develop a body of federal common law to govern issues in ERISA actions not covered by the act itself," Pet. App. 11a (quotation omitted), including "develop[ing] remedies beyond those expressly provided by ERISA," Pet. App. 12a. But this is precisely what Congress sought to prohibit states from doing when it reversed the general rule that state courts must enforce federal rights and specifically gave exclusive jurisdiction to federal courts over all claims under ERISA except for a very narrow category of cases.[11] *See generally American Airlines, Inc.* v. *Wolens* 115 S. Ct. 817, 825 (1995) (ERISA "channel[s] civil actions into federal courts"). Congress' obvious concern was that states like Alabama with an eccentric vision of how the common law should develop would impose their parochial concerns and policy choices on a federal statutory regime that must

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[11]Section 502(e)(1) of ERISA provides: "Except for actions under . . . [§ 502(a)(1)(B)], the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter. . . ." 29 U.S.C. § 1132(e)(1). Under § 502(a)(1)(B), state courts have concurrent jurisdiction only over claims for recovery of benefits due "under the terms of [the] plan," enforcement of participants' rights "under the terms of the plan," or clarification of participants' rights to future benefits "under the terms of the plan." 29 U.S.C. § 1132(a)(1)(B).

be uniform in order to function effectively. *Cf. Alessi*, 451 U.S. at 523 (Congress "meant to establish pension plan regulation as exclusively a federal concern").

If left uncorrected, the Alabama Supreme Court's decision will create an ERISA system in Alabama, as well as in any other jurisdictions that might choose to follow the erroneous decision below, in which extracontractual damages may be allowed to flourish, as plaintiffs who cannot recover such damages elsewhere will seek to bring suit in those more hospitable forums. Indeed, some courts might read a denial of certiorari as a signal that this Court might tolerate other lower court decisions that ignore this Court's clear ERISA precedents. If the decision below is any indication, the Alabama Supreme Court stands ready to endorse the same broad and expansive extracontractual remedies under ERISA that it has become notorious for encouraging under its state common law tort system. Such a development would destroy the certainty and uniformity in the ERISA civil enforcement structure enacted by Congress.

CONCLUSION

For the reasons set forth in Jefferson-Pilot's petition for certiorari, the Alabama Supreme Court had no basis under § 502(e)(1) to exercise jurisdiction over plaintiffs' claims of breach of fiduciary duty and interference with ERISA-protected rights. Accordingly, the Court should grant certiorari on the first question presented and summarily reverse on jurisdictional grounds.

But in the event that the Court decides to address the merits of the decision below, the Court should make clear that courts in Alabama and elsewhere are not free to fashion federal common law remedies under ERISA that have no basis in the text of that statute or in Congressional intent. The Alabama Supreme Court's holding that plaintiffs may seek extracontractual damages under ERISA contradicts this Court's decisions in *Russell*, *Pilot Life*, and *Mertens*, manifestly frustrating the goal of Congress to contain the costs of funding and administering employee benefit plans under ERISA. Contradicting the precedents of this Court,

the decision below also creates needless confusion in an area of the law where certainty is needed and intended by Congress.

October 6, 1995

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